## Sin Hock Soon Transport Sdn Bhd & Anor v Low King Ban

HIGH COURT (TAIPING) — CIVIL APPEAL NO 12–26 OF 2004
ZAKARIA SAM J
8 FEBRUARY 2006

*Damages (Personal Injury or Death) — Personal injuries — Insurance money paid to plaintiff — Whether sum received from insurance policy under a general accident policy could be deducted from award — Civil Law Act 1956 s 28A(1)(a)*

The respondent was injured in a motor accident and consequently treated for his injuries at the Ipoh Specialist Centre, Ipoh. In the lower court, it was not disputed that the respondent had incurred a bill of RM38,878.00 pertaining to his medical treatment at the Ipoh Specialist Centre, Ipoh. From this sum, the amount of RM37,744.20 was paid by the respondent's insurance company where he had taken out a policy covering for the injuries that he had sustained. The learned counsel for the appellants contended that the respondent was not entitled to the sum of RM37,744.20 as the monies were paid by his insurance company. The respondent did not pay this sum of RM37,744.20 'out of his own pocket'. The sessions court judge awarded the sum of RM37,744.20 to the respondent. The appellant filed this appeal against the decision of the learned session's judge.

**Held**, dismissing the appeal:

(1) It must be noted that in *Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ 317, the employer was the party who paid for the premium under the contract of employment and even that the damages awarded and received by the plaintiff in *Ward*'s case was not deducted. In the instant appeal, the respondent himself purchased the policy and paid for the premiums and by applying the principles as enunciated in *Ward*'s case, the respondent was clearly entitled to the insurance monies paid under his own cover of insurance and also the special damages awarded by way of his claim against the appellants (see para 16).

(2) The respondent in the present appeal is in as good a position as any other in that s 28A(1)(a) of the Civil Law Act 1956 has made it abundantly clear that any sum paid or payable in respect of personal injury which does not result in death under any contract of assurance or insurance shall not be taken into account in assessing damages (see para 21).

**[Bahasa Malaysia summary**

Responden mengalami kecederaan dalam satu kemalangan motor dan kecederaannya telah dirawat di Ipoh Specialist Centre, Ipoh. Tidak dipertikaikan di mahkamah

rendah, bahawa responden dikenakan bayaran sebanyak RM38,878.00 berhubung dengan rawatan perubatannya di Ipoh Specialist Centre, Ipoh. Dari jumlah ini, amaun sebanyak RM37,744.20 dibayar oleh syarikat insurans responden di mana dia telah mengambil satu polisi yang melindunginya untuk kecederaan-kecederaan yang telah dialaminya. Peguamcara bijaksana perayu menyatakan bahawa responden tidak berhak kepada jumlah RM37,744.20 oleh kerana wang tersebut dibayar oleh syarikat insuransnya. Responden tidak membayar jumlah RM37,744.20 daripada duitnya sendiri. Hakim mahkamah sesyen mengawardkan jumlah RM37,744.20 kepada responden. Perayu memfailkan rayuan ini terhadap keputusan hakim sesyen yang bijaksana.

**Diputuskan**, menolak rayuan tersebut:

(1) Ia harus diambil perhatian bahawa dalam kes *Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ 317, majikan merupakan pihak yang membayarkan premium di bawah kontrak pekerjaan dan walau begitupun ganti rugi yang diaward dan diterima oleh plaintif di dalam kes *Ward* tidak dipotongkan. Dalam kes rayuan ini, responden sendiri membeli dan membayar polisi tersebut dan dengan menerimapakai prinsip seperti yang dinyatakan di dalam kes *Ward*, responden secara jelasnya berhak kepada wang polisi yang dibayar di bawah insuransnya sendiri dan juga ganti rugi khas yang diaward kepadanya melalui tuntutannya terhadap perayu (lihat perenggan 16).

(2) Responden di dalam rayuan ini berada dalam kedudukan yang sebaik yang lain di mana s 28A(1)(a) Akta Undang-Undang Sivil 1956 telah dengan jelasnya menyatakan bahawa sebarang jumlah bayaran yang dibayar atau perlu dibayar berhubungan dengan kecederaan ke atas diri sendiri yang tidak menyebabkan kematian di bawah sebarang kontrak jaminan diri atau insurans tidak akan diambil kira dalam penilaian ganti rugi (lihat perenggan 21).]

**Notes**

For a case on insurance money paid to plaintiff for personal injuries, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) para 588.

**Cases referred to**

*Judd v Board Of Governors of the Hammersmith, West London and St Mark's Hospitals & Anor* [1960] 1 All ER 607 (refd)

*Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy* [2005] 2 MLJ 697 (not folld)

*Lee Thiam v Fatimah binte Salleh* [1981] 1 MLJ 285 (refd)

*Lew Thai v Chai Yee Chong* [1997] 5 MLJ 762 (refd)

*Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 (refd)

*Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 (refd)

*Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 (refd)

*Tai Siat Fah & Ors v Lawful Personal Representative of Badrul Hisham bin Hashim* [1995] 2 MLJ 571 (refd)

*Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 (refd)
*Topaiwah v Salleh* [1968] 1 MLJ 284 (refd)
*Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ 317 (folld)

**Legislation referred to**
Civil Law Act 1956 s 28A(1)(a)
Employee's Social Security Act 1969 s 42
Road Traffic Act 1976

**Appeal from**: Summons No 53–52 of 2002 (Sessions Court, Kuala Kangsar)

*Hammad Faesol bin Zuhad (CK Leong & Co) for the appellants/defendant.*
*Kirenjit Kaur (Gurdev Daljit Su & Co) for the respondent/plaintiff.*

**Zakaria Sam J:**

**[1]** The appellant filed this appeal against the decision of the learned session's judge, essentially, in respect of only one issue as set out in ground 5 of the memorandum of appeal which I have taken the liberty to reproduce as follows:

> Yang Arif Tuan Hakim telah tersilap dari segi undang-undang dan fakta apabila mengawardkan ganti rugi khas untuk kos perubatan Hospital Swasta sebanyak RM37,744.20 kepada responden/plaintif walaupun jumlah tersebut telah dibayar sepenuhnya oleh pihak insuran responden/plaintif.

After having heard both the counsels for the appellants and respondent, I have dismissed the appeal with cost and here are the grounds of my decision.

FACTS

**[2]** On 30 June 2001 at about 3.40pm, the respondent was riding a motorcycle No ADH 7174 and he was involved in an accident with a motor lorry trailer No WDM 3827 at the junction of Jalan Ipoh/Kuala Kangsar-Lintang and Sg Siput Utara. As a result of the said accident, the respondent was injured and consequently treated for his injuries at the Ipoh Specialist Centre, Ipoh.

**[3]** In the lower court, it was not disputed that the respondent had incurred a bill of RM38,878 pertaining to his medical treatment at the Ipoh Specialist Centre, Ipoh. From this sum, the amount of RM37,744.20 was paid by the respondent's insurance company where he had taken out a policy covering for the injuries that he had sustained.

JUDGMENT OF THE LOWER COURT

**[4]** In view of the fact that this appeal is confined only to one issue as I have mentioned earlier, it is useful at this juncture to set out the relevant part of the

judgment of the learned sessions judge upon which the appellants would like this court to reverse.

(e) Kos perubatan

Jumlah RM38,876.60 telah disetujui. Yang dipertikai ialah sejumlah RM37,744.20 darinya telah dibayar oleh insuran diri plaintif sendiri. Isunya sama ada jumlah ini boleh dituntut dari defendan. Mahkamah berpendapat ianya boleh dituntut dari defendan kerana s 28A Akta Undang-Undang Sivil 1956 memperuntukkan seperti berikut:

28A. Damages in respect of personal injury.

(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —

(a) Any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the conning into force of this Act;

(b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or

(c) any sum which has been or will or may be paid under any written law relating tothe payment of any benefit or compensation whatsoever in respect of the personal injury

Pengarang *Winfteldand Jolowicz on Tort* (11th Ed) di ms 616 mencatatkan:

Thus charitable payments are not taken into account for the simple reason that otherwise there would be a risk that the springs of charity would dry up, nor win the courts make a deduction in respect of the proceeds of insurance, largely it seems, because it is felt that the plaintiff should not be penalized for his own foresight and thrift. Wages or sick pay paid by an employer as a matter of contractual obligation clearly to reduce the plaintiff's loss are therefore deductible, unless made on condition of repayment in the event of a successful claim for damages.

Prinsip inilah yang diterima pemakaiannya di Malaysia melalui peruntukkan s 28A tadi dan kes Mahkamah Agong, *Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ 317 telah mengesahkannya.

Oleh itu, plaintff berhak menuntut keseluruhan jumlah tersebut dari defendan.

APPELLANTS' CONTENTIONS

**[5]** The learned counsel for the appellants contended that the respondent is not entitled to the sum of RM37,744.20 as the monies were paid by his insurance company. The respondent did not pay this sum of RM37,744.20 'out of his own pocket'. In support thereto, this court was referred to the case of *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 wherein it was held that (at p 297):

In an action for personal injuries, there are two classes of damages which have to be considered - special damages which has to be specially pleaded and general damages which

need not be specially pleaded. In both classes of damages the burden of proof based on the balance of probabilities in the evidence lies on the plaintiff. Special damages consists of out of pocket expenses, such as hospital bills and actual loss of earnings during period of total incapacity, and is generally capable of substantially exact calculation.

**[6]** The learned counsel for the appellants proceeded to explain that if at all any sum is to be awarded, the respondent is only entitled to the premium paid for the insurance cover/and or loss of non-claim bonus ('NCB').

**[7]** By way of analogy, the learned counsel for the appellants illustrated with the example of a person who has a comprehensive policy of insurance (taken out as required by the Road Traffic Act 1976) in respect of his motor vehicle. In the event the said vehicle is damaged, the bill for repairs would be paid by his insurance company and all that the person is entitled to claim is the loss of his NCB and not for costs of repairs.

THE RESPONDENT'S REPLY

**[8]** The learned counsel for the respondent submitted that the interpretation placed by the counsel for the appellants on the phrase 'out of pocket expenses' was actually too restrictive and not accurate. She contended that nursing care (which is an item of special damages) can be claimed by family members or relatives of the respondent without the respondent actually paying anything 'out of his pocket'.

**[9]** The learned counsel then referred to s 28A(1)(a) of the Civil Law Act 1956 and emphasized that the wordings of s 28A(1)(a) clearly stipulates that any monies received under any contract of assurance or insurance cannot be deducted when assessing damages. She went on to explain that if a person is prudent enough to take out an insurance policy to protect against personal injury, permanent disability or for that matter his life, the policy holder should not be penalized for his own foresight.

**[10]** In reply to the appellants' submission that a person cannot claim for repair but only for the loss of NCB, the learned counsel for the respondent commented on the different basis for a claim under property insurance where the claim is premised on an indemnity basis whereas life and personal accident insurance is not. Finally, she submitted that s 28A(1)(a) deals with personal injury and not damage to property.

DECISION OF THIS COURT

**[11]** In order for me to reverse the decision of the learned sessions judge, the appellants must show that the trial court had misdirected itself on points of law or that the award was entirely erroneous. Unless I am so convinced, it is the duty of the appellate court to uphold the decision of the lower court as appeal to a higher tribunal or court starts with the premise that it is correct in all respect unless it can be shown otherwise. The principle upon which an appellate court will interfere with

A the lower court's decision is well settled and I have in coming to my decision in the instant case kept the under mentioned authorities in mind:

(1) *Topaiwah v Salleh* [1968] 1 MLJ 284 (FC);

(2) *Lee Thiam v Fatimah binte Salleh* [1981] 1 MLJ 285 (FC);

B (3) *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 [FC);

(4) *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 (SC).

**[12]** In the instant case, there is clearly no dispute that there was a valid policy of insurance subsisting at the material time and under this policy of insurance the C respondent was duly compensated for his medical bills by the insurance company that issued the cover of insurance.

**[13]** In the case of *Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ 317, a decision of the then Supreme Court where the issue involved is more or less similar D to this appeal, Mohamed Azmi SCJ had this to say at p 320:

> On the issue of deducibility under the second head s 28A(l) (a) the Civil Law Act 1956 provides;
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> In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —
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> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
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> Mr RK Nathan, in his argument, urges this court not to limit the interpretation of this provision to insurance policies the premiums of which are paid by the injured person. F On behalf of the respondents, it seems to be suggested that English authorities would only exclude deducibility in cases where the premiums are paid for by the injured person. Thus, in *Bradbum v Great Western Railway Co* which was considered in *Parry v Clever*, it was held that in an Action for injuries by the defendant's negligence, a sum received by the plaintiff on an accident insurance policy (which he had paid for) cannot be taken into account in deduction of damages.
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> In ordering the deduction, the learned judge relied principally on the House of Lords case of *Hussain v New Taplow Paper Miffs Ltd and Nabi v British Leyland (UK) Ltd*. It would appear that, on the question of deducibility, His Lordship applied the simple test of who paid for the premiums of the Insurance policy. We regret to say that the law in English on deducibility is not that simple. In fact, there the law on this subject is so unsettled that H Parliament has intervened with a compromise solution by providing in some instances that half of a certain payment, over a period, can be deducted in assessing the loss, for example, s 2 of the Law Reform (Personal Injuries) Act 1948. But this type of solution is not open to any court where the statute is silent. The guiding principle governing decision in border line situations is that 'The common law had treated this matter as one depending on justice, reasonableness and public policy', per Lord Reid in *Parry v Cteaver* at p 13).
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**[14]** His Lordship further observed:

> What are the facts in the present appeal? As can be observed, even under the common law it is necessary to consider the nature of the benefits paid or payable under the insurance

policy to determine, inter alia, whether the money received by the appellant is under a purely personal insurance policy or by way of benefit arising out of his employment. Consideration should also be given to whether the benefit is analogous to wages or to pension. It is not in dispute that under the terms of the contract of employment between MAS and the appellant, the former are obliged to take out personal insurance policy to cover all their pilots and certain other category of employees in case of death or permanent disablement. The insurance money is payable by the insurers direct to the injured pilot irrespective of negligence on the part of anyone, or whether the fatal or permanent injury is caused by riots, civil commotion or war risks.

**[15]** At p 321, it was further explained that:

The benefits payable under the policy in this appeal are obviously not intended to reimburse MAS of payments made by them to their employees under the terms and conditions of the contract of employment. In our opinion, the insurance cover is a service benefit contractually granted by MAS to their pilots on termination of their services arising from death or permanent disability. It is analogous to pension or gratuity and therefore should not be deducted. To be deductible, the contractual payment should be analogous to wages such as 'sick pay' in Hussain's case or statutory unemployment benefits as in Nabi's case. Here, the insurance payment cannot possibly be treated as if MAS continued to pay part of the appellant's wages after the accident to support the argument against double payment. The loss of earnings, past and future, that the appellant is entitled under the Civil Law Act 1956, which is caused by the negligence of MAS, should not be diminished by such contractual benefits which are analogous to lump sum pension or gratuity even under the common law. Further, although MAS is paying the premium under the contract of employment, the appellant's services given under it form the reward (equivalent to a premium] which entitles him to the benefit. As alluded to earlier, it is a form of lump sum pension or gratuity payable in the event of his death or permanent disability when employment has ceased.

To put the issue of deducibility beyond doubt in the present appeal, our Parliament has, fortunately for the appellant, introduced s 28A(1)(a) By Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere compromise solution against deducibility. We agree with Mr RK Nathan that the plain meaning of the words used in that section should be adopted for the purpose of interpretation. Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death 'under any contract of assurance or insurance' shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deducibility even in border line situations although the injured person has not directly contributed to the insurance scheme.

For the above reasons, it is our opinion that having regard to the nature of the scheme of the policy, the insurance benefits in this case are not deductible both under s 28A(1)(a} and the common law itself.

**[16]** It must be noted that in *Ward*'s case, the employer was the party who paid for the premium under the contract of employment and even that the damages awarded and received by the plaintiff in *Ward*'s case was not deducted. In the instant appeal before me, the respondent himself purchased the policy and paid for the premiums and by applying the principles as enunciated in *Ward*'s case, the respondent is clearly entitled to the insurance monies paid under his own cover of insurance and also the special damages awarded by way of his claim against the appellants.

**[17]** Similarly, an employee who has contributed under the Employee's Social Security Act 1969 ('the Act'), can claim the benefits under the said Act and also under the common law at the same time. In *Lew Thai v Chai Yee Chong* [1997] 5 MLJ 762, the defendant pleaded that by virtue of s 42 of the Act, the plaintiff was barred from claiming damages. The court held that if the plaintiff was entitled to any of the benefits under the Act, then the plaintiff should not be entitled to any other similar benefits under any other written law. Since the plaintiff was claiming under the common law and common law could not be construed as 'any other written law' the plaintiff's claim was allowed.

**[18]** Furthermore, it is only fair and just that the respondent here should not be penalized for his prudence and foresight in taking out an insurance policy to protect his life, permanent disability or medical expenses as a result of an accident.

**[19]** In *Judd v Board Of Governors of the Hammersmith, West London and St Mark's Hospitals & Anor* [1960] 1 All ER 607, It was held that:

> ... there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him.

**[20]** In *Tai Siat Fah & Ors v Lawful Personal Representative of Badrul Hisham bin Hashim* [1995] 2 MLJ 571, my learned brother Abdul Malik Ishak J in allowing the appeal from the sessions court held that:

(1) In interpreting the relevant provisions of the Workmen's Compensation Act 1952 ('WCA') and the CLA, the court was constrained to enforce and adhere to the meaning therein, no matter how harsh the result may be, as the statutory language employed was clear and unequivocal.

(2) Applying this rule of interpretation, it was clear that s 20(a) of the WCA contains no definite injunctive stricture which prohibited the appellant from claiming under the CLA after receiving compensation under WCA, This was unlike the constraints contained in ss 31 and 42 of the Employees' Social Security Act 1969.

(3) Section 7(3)(i)(d) of the CLA in its plain language provides that any sum which has been paid under any written law relating to any compensation shall not be taken into account in assessing damages. Hence, it was clear that the compensation paid to the appellant under the WCA would not bar a dependency claim under s 7 of the CLA, in respect of loss of support and damages for bereavement under s 7(3A) of the CLA, nor was such compensation deductible.

**[21]** Hence, the respondent in the present appeal is in as good a position as any other in that s 28A(1)(a) of the Civil Law Act has made it abundantly clear that any sum paid or payable in respect of personal injury which does not result in death under any contract of assurance or insurance shall not be taken into account in assessing damages.

**[22]** In addition thereto, I must put on record that the approach or interpretation adopted by the learned counsel for the respondent on the words special damages was more appropriate and the said words must not be restricted only to monies paid out

of the pocket of the respondent. As stated earlier, the learned counsel for the respondent explained that nursing care could still be claimed under the head of special damages where such care has been given by family members or relatives with no financial payment involved at all. In *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, the Supreme Court confirmed that compensation can be given even where the services are provided by parents.

**[23]** In the circumstances, there is no merit whatsoever on the narrow interpretation urged upon this court by the learned counsel for the appellants on the words 'out of pocket' expenses under the head of special damages.

**[24]** On the question as submitted by the learned counsel for the appellants on the costs of repairs to the vehicle where a plaintiff has purchased a cover of insurance as required by the law, I am of the view that the illustration does not apply to the facts of our present appeal as the insurance policy taken out is essentially a contract of indemnity for repairs to the vehicle. It is claimable by the plaintiff against the insurance company as the defendant if it cites itself as a party. The insurer can off course come in by way of subrogation i.e. step into the shoes of their insured.

**[25]** The decision of the learned sessions judge that the sum of RM37744.20 was payable by the appellants to the respondent is clearly supported by the provisions in s 28A(1)(a) of the Civil Law Act 1956 and the decision of the Supreme Court in *Ward*'s case with which decision both the learned session court's judge and this court is bound by virtue of the principle of *stare decisis*.

**[26]** In the midst of writing this judgment, I came across the case of *Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy* [2005] 2 MLJ 697. In this case, it was held that (at p 682):

> Hence, it is clear that the plaintiff cannot claim for the medical expenses paid by the insurance company because the right to recover the medical expenses lies in the hand of his insurer. The medical expenses of RM30,000 awarded by the learned sessions court judge has enriched the plaintiff. This enrichment has violated the philosophy behind the principle of compensatory damages upheld in this country. Therefore such an award shall not be allowed.

**[27]** With the greatest respect to my learned brother Faiza Tamby Chik J, I cannot agree with his conclusion by virtue of the interpretation of s.28A(l)[a) of the Civil Law Act 1956 and the decision of the Supreme Court in *Ward*'s case.

**[28]** Upon perusal of the case of *Khairul Sham Ahmad*, I noted with interest that the learned judge was never referred to s 28A(1)(a) of the Civil Law Act 1956 nor to *Ward*'s case and I am sure he would arrive at a different decision if the said Act or *Ward*'scase had been referred to him.

A **[29]** In the upshot and for the aforesaid reasons, the appeal is dismissed with costs. I must thank both the counsels for the appellants and respondent for their effort and diligence in preparing and presenting their respective arguments before this court.

*Appeal dismissed.*

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Reported by Sally Kee

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